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Supreme Court of the United States

October Term, 1955

No.....

DAVID RINES, individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions, APPELLANT.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The appellant, David Rines, individually and as administrator of the estate of his wife, Lucy L. Rines, submits herewith this Jurisdictional Statement, to show that the Supreme Court of the United States has jurisdiction of this appeal, and that substantial federal questions are presented.

OPINION BELOW

This is an appeal from the final rescript or judgment of the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing a Petition to Establish the Truth of Exceptions, numbered, on the docket of the said Supreme Judicial Court, No. 11,458. The order of dismissal, which is unreported, reads as follows:

After hearing, it is ordered that the petition be, and the same hereby is, dismissed for the reason that even if the bill of exceptions were allowed as filed with the paragraph which the single justice refused to allow included in it there would be no merit in the bill:

(a) This court has already held that if the petitioner's Second Substitute Consolidated Bill of Exceptions in his tort actions was ever permitted to be filed, it has been disallowed. *Rines, petitioner,* Mass. Adv. Sh. (1954) 819, 821.

(b) The judge of the Superior Court could not be required "to make a ruling as to whether the said Amended Second Substitute Consolidated Bill of Exceptions does or does not comply with the said order of July 2, 1953, in so far as the items included in the said order of July 2, 1953, conform to the truth." It is plain that the so called Second Substitute Consolidated Bill of Exceptions did not comply with the order of July 2, and it does not appear that the petitioner was ever permitted to amend by filing such a bill.

(c) The petitioner's remedy, if he was entitled to any, in respect to these matters was by petition to establish his exceptions under G. L. (Ter. Ed.) c. 231, § 117, and not by petition for a writ of mandamus. *Rines* v. *Justices of the Superior Court,* 330 Mass. 368, 371. His lack of success in a petition to establish exceptions does not give him the right to try again by mandamus.

(d) In so far as the petition for a writ of mandamus seeks to forbid one of the judges of the Superior Court from taking further action in the tort cases on the ground of bias and prejudice, the questioned paragraph in the bill of exceptions is obviously immaterial. The granting of an order of notice on a petition for a writ of mandamus is a matter of sound judicial discretion. *Snyder, petitioner,*

284 Mass. 367. *Nichols* v. *Dacey,* 329 Mass. 598. It was plainly proper to deny the order where the result of granting it would practically be to place the judge of the Superior Court on trial as to bias and prejudice when the cases might never come before him again in any form. If they should come before him again the matter of bias and prejudice could then be raised.

April 13, 1955.

BY THE COURT,
STANLEY E. QUA,
Chief Justice.

The said Petition to Establish The Truth of Exceptions, No. 11,458, is one of a number of companion Petitions to Establish the Truth of Exceptions, several of which are more fully described on pages 2 and 3 of the Jurisdictional Statement in No. 694, October Term, 1954, appeals dismissed for the want of a substantial federal question, May 23, 1955. The appellant has filed a Petition for Rehearing in the said No. 694.

JURISDICTION

The said rescript or judgment of the Supreme Judicial Court was dated and entered April 13, 1955. A Notice of Appeal was filed May 2, 1955.

The jurisdiction of the Supreme Court of the United States to review the dismissal by the Supreme Judicial Court by direct appeal is conferred by 28 U.S.C., Section 1257(2).

Some of the grounds upon which this appeal is based, if taken alone, would have been more appropriately considered under 28 U.S.C., Section 1257(3). They are proper

to be included, however, under the decision of this Court in *Flournoy* v. *Wiener*, 321 U.S. 253, 263. A separate petition for certiorari would appear to be unnecessary in view of 28 U.S.C., Section 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the rescript or judgment on direct appeal in this case:

With respect to the repugnancy of a state statute, as applied, to the Constitution of the United States: *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282, 290, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 86, *Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 206.

A dismissal of a Petition to Establish the Truth of Exceptions constitutes a termination of the litigation both in the Supreme Judicial Court and also the Superior Court. With respect to the finality of the litigation, therefore "there is nothing more to be decided". *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 382.

The federal questions were raised, before a single justice of the Supreme Judicial Court, in the very first pleading, a Petition for Writ of Mandamus. The finality of the decision of the Supreme Judicial Court on this Petition for a Writ of Mandamus is therefore further established by *Hartman* v. *Greenhow*, 102 U.S. 672, 675 and *Detroit and Mackinaw Railway Company* v. *Michigan Railroad Commission*, 240 U.S. 564, 571.

Further decisions bearing on jurisdiction will be cited hereinafter.

THE STATUTES INVOLVED

This appeal involves the validity, as applied in this case, of two statutes of the Commonwealth of Massachusetts, chapter 231, sections 113 and 117, of the General Laws, Tercentenary Edition, referred to herein as the first and second statutes, respectively. These are reproduced in Appendix A.

The first statute, section 113, provides that: first, exceptions to rulings of a judge of the Superior Court, or of a *single justice of the Supreme Judicial Court*,* in any civil cause tried by a jury or heard by the Court, shall be reduced to writing in a summary manner; secondly, the excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him; and, thirdly, if the presiding judge finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them.

The second statute, section 117, provides that, if the judge of the Superior Court or the single justice of the Supreme Judicial Court disallows or fails to sign and return the exceptions, the excepting party may thereupon file, before the Full Court of the Supreme Judicial Court, a Petition to Establish the Truth of the Exceptions.

*This phrase is italicized, because the Petition to Establish the Truth of Exceptions, No. 11,458, involved on the present appeal, arose, as will hereinafter appear, out of the refusal of the single justice of the Supreme Judicial Court to issue an order of notice upon the appellant's Petition for a Writ of Mandamus involved on the present appeal.

QUESTIONS PRESENTED

1. Whether the said two statutes, chapter 231, sections 113 and 117, as applied, are valid, or, on the contrary, are repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. Whether, consistent with the Fourteenth Amendment, the said two statutes, chapter 231, sections 113 and 117, may be so applied as: first, to deny the appellant, both in the Superior Court and the Supreme Judicial Court, a hearing, at which to offer evidence with respect to a "Second Substitute Consolidated Bill of Exceptions", prepared in full compliance with an order of the Superior Court; and, secondly, without hearing, to dismiss the appellant out of court upon the basis of a speculatively assumed "if" that is contrary to fact, and as to which the appellant is not even permitted to offer evidence that it is contrary to fact.

3. Whether, consistent with the Fourteenth Amendment, the said two statutes, chapter 231, sections 113 and 117, may be so applied as: first, to authorize the issuance of an order requiring the appellant to file an "Amended Second Substitute Consolidated Bill of Exceptions" that shall not conform to the truth, without affording the appellant, either in the Superior Court or the Supreme Judicial Court, a hearing, at which to offer evidence as to such non-conformity with the truth; and, secondly, without hearing, to dismiss the appellant out of court as punishment for refusing to obey such order to amend into non-conformity with the truth.

4. Whether, consistent with the Fourteenth Amendment, the said two statutes, chapter 231, sections 113 and 117, may be so applied as: first, to deny the appellant, in the Supreme Judicial Court, a hearing, at which to offer evi-

dence with respect to a Petition to Establish the Truth of Exceptions, upon the ground that the Superior Court has denied the appellant a hearing upon the said exceptions; and, secondly, to deny the appellant, in the Supreme Judicial Court, a hearing upon a Petition for a Writ of Mandamus seeking to compel the Superior Court to grant the appellant a hearing upon the said exceptions.

STATEMENT OF THE CASE

Introduction

Petitions to Establish the Truth of Exceptions and the procedure relating thereto are described on pages 8-13 of the Jurisdictional Statement in the before-mentioned case, No. 694, October Term, 1954. As stated on page 10 of that Jurisdictional Statement, such petitions, under the said two statutes, sections 113 and 117, as applied, are dismissed by the Full Court of the Supreme Judicial Court summarily, without opportunity to present evidence, and without effective hearing, except in the rare instances when the petitioners are referred by the Full Court to a Commissioner.

As appears from page 7 of that Jurisdictional Statement, the appellant, both individually and as administrator of the estate of his wife, Lucy L. Rines, is the plaintiff in sixteen actions at law in the Superior Court of the Commonwealth of Massachusetts. These sixteen actions were consolidated for trial and, as so consolidated, were tried to a jury. The trial terminated in directed verdicts for the defendants. In several instances, the verdicts were directed after the jury had found for the plaintiff. In other instances, the judge did not permit the cases even to get as far as the jury. A complete account of the proceedings is given

in the appellant's verified petition for a Writ of Mandamus, referred to at the bottom of page 1 and the top of page 2 of the "Reply Brief on Behalf of the Appellant", in the before-mentioned case, No. 694, October Term, 1954.

The appellant saved exceptions, and filed successively four bills of exceptions. These are described, on pages 15-16 of the before-mentioned Jurisdictional Statement, No. 694, October Term, 1954, as an original bill of exceptions, a first "Substitute Consolidated Bill of Exceptions", a "Second Substitute Consolidated Bill of Exceptions", and an "Amended Second Substitute Consolidated Bill of Exceptions". It is further there stated that the appellant abandoned his first "Substitute Consolidated Bill of Exceptions", and that the two appeals in the said No. 694, October Term, 1954, are concerned with the original bill of exceptions and the "Second Substitute Consolidated Bill of Exceptions".

The present appeal seeks relief with respect to the "Second Substitute Consolidated Bill of Exceptions" and the "Amended Second Substitute Consolidated Bill of Exceptions". These were filed pursuant to written orders of the judge of the Superior Court dated, respectively, January 8, 1951, and July 2, 1953. The "Second Substitute Consolidated Bill of Exceptions" conformed fully to the order, dated January 8, 1951. The "Amended Second Substitute Consolidated Bill of Exceptions" conformed to the order dated July 2, 1953, but not fully, because full compliance with the order of July 2, 1953 would have rendered the "Amended Second Substitute Consolidated Bill of Exceptions" contrary to the truth.

The Events Leading to the Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,437, Contained in the "Second Substitute Consolidated Bill of Exceptions".

With the "Second Substitute Consolidated Bill of Exceptions", the appellant filed two motions: one, that the "Second Substitute Consolidated Bill of Exceptions" be substituted for the original bill of exceptions; and the other, that the "Second Substitute Consolidated Bill of Exceptions" be allowed. The said judge of the Superior Court, however, has refused to hear the petitioner upon these motions, and he has refused either to grant or deny either of these two motions.

The appellant, therefore, under the provisions of the second statute, section 117, filed his Petition to Establish the Truth of Exceptions, No. 11,437, contained in this "Second Substitute Consolidated Bill of Exceptions". This, however, the Supreme Judicial Court dismissed, *Rines, Petitioner*, Advance Sheets, 1954, page 819, reproduced as Appendix A, commencing with page 31 of the Jurisdictional Statement, No. 694, October Term, 1954.

The reasons given for the dismissal of this Petition to Establish the Truth of Exceptions, No. 11,437, were two in number, both constituting pure speculation or assumption.

For present purposes, it will suffice to consider the first reason alone, pages 31-32 of the said Jurisdictional Statement, No. 694:

> It is a matter of *serious doubt* whether the trial Court ever permitted it [the "Second Substitute Consolidated Bill of Exceptions"] to be filed or to stand as a substitute for or amendment of the original bill • • • If such amendment was never permitted in the trial court

> this "Second Substitute Consolidated Bill of Exceptions" * * * has no standing and cannot be established in this Court (italics supplied).

There would have been no need for the "serious doubt" expressed in this quotation if the Supreme Judicial Court had granted the appellant a hearing, at which to present evidence. At such hearing, as the appellant hastened to inform the Supreme Judicial Court, on pages 19-20 of the petition for rehearing referred to on pages 5-6 of the said Jurisdictional Statement, No. 694, October Term, 1954, and which is before this Court, the appellant would have offered evidence to prove that there was no doubt whatever, "serious" or otherwise; for the appellant admits that the judge of the Superior Court had *not* permitted the "Second Substitute Consolidated Bill of Exceptions" "to be filed or to stand as a substitute for or amendment of the original bill". To quote from the petition for rehearing,

> This Court expresses "serious doubt", however, whether any order was ever made by the said judge of the Superior Court expressly permitting the "Second Substitute Consolidated Bill of Exceptions" to be filed or to stand as a substitute for or an amendment to the original bill of exceptions.
>
> The petitioner will remove that doubt by stating that no such order was ever expressly made. * * * the petitioner filed in the Superior Court, contemporaneously with the filing of the "Second Substitute Consolidated Bill of Exceptions", two motions, one to allow the "Second Substitute Consolidated Bill of Exceptions", and the other to substitute the "Second Substitute Consolidated Bill of Exceptions" for the original bill of exceptions. The said judge of the Superior Court has never, however, even up to the present time, taken any action whatever upon either of the said two motions, whether to grant them or to deny them, and the said two motions are therefore still pending and undisposed of.

The Supreme Judicial Court did not, however, modify its decision in any way, and it persisted in its refusal to grant the appellant a hearing.

One of the aims sought to be attained by the Petition for a Writ of Mandamus involved on the present appeal, therefore was to compel the Superior Court to take action upon this "Second Substitute Consolidated Bill of Exceptions".

The Events Leading to the Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,399, Contained in the "Amended Second Substitute Consolidated Bill of Exceptions".

As is related on pages 17-18 of the Jurisdictional Statement, No. 694, October Term, 1954, the "Amended Second Substitute Consolidated Bill of Exceptions" was filed under the following circumstances:

On July 2, 1953, after a so-called hearing, on June 29, 1953 (at which the appellant was denied the privilege of offering evidence), the judge of the Superior Court issued a written order requiring the appellant to amend the "Second Substitute Consolidated Bill of Exceptions" by incorporating therein a number of changes demanded by opposing counsel, some of which did and others of which did not conform to the truth. Insofar as the said order of July 2, 1953, required changes not in conformity with the truth, of course, it was illegal and void, but the judge of the Superior Court refused to hear the appellant as to that (or any other) matter. The appellant complied with the said written order of July 2, 1953, however, insofar as it was possible to do so within the limits of the truth. The "Amended Second Substitute Consolidated Bill of Excep-

tions" contains all the demanded changes except those not conformable to the truth.

The judge of the Superior Court held a so-called hearing on the "Amended Second Substitute Consolidated Bill of Exceptions" on December 22, 1953.

The appellant would quote as follows, from pages 8 and 10 of the affidavit of the appellant's attorney, Lester W. Cooch, accompanying the petition for rehearing (there was no other way to impart this information to the Supreme Judicial Court, in the absence of a hearing, at which to present evidence):

> Together with this "Amended Second Substitute Consolidated Bill of Exceptions", I filed also a Memorandum, stating that it complied, in every particular, with the said order of July 2, 1953, except insofar as complete compliance would have resulted in violation of the truth. The said Memorandum also stated which of the ordered items had not been incorporated in the "Amended Second Substitute Consolidated Bill of Exceptions", explaining why the items so not incorporated were not in conformity with the truth. • • • •
>
> The said Memorandum that I filed with the "Amended Second Substitute Consolidated Bill of Exceptions" concluded:
>
> > The plaintiff has made a bona fide effort to comply with the order of the court, and prays for a further order in the event that he should be held inadvertently to have failed to do so, in any particular.
>
> I also read that sentence, verbatim, in open Court, at the said hearing, on December 22, 1953, and requested the said judge to make a ruling as to whether his said order of July 2, 1953 had or had not inadventently required to be incorporated into the said "Amended Second Substitute Consolidated Bill of Exceptions" changes that did not conform to the truth. I did not, therefore, defy the said judge of the Superior Court. I merely requested that the said judge of the Superior Court re-consider its order with respect to those few items that do not conform to the truth, and I also

requested a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the said order of July 2, 1953, insofar as the items contained in the said order conform to the truth. These requests, however, have been ignored.

So ignoring these requests, the judge of the Superior Court entered an order denying a motion by the appellant to allow this "Amended Second Substitute Consolidated Bill of Exceptions".

This order, under the ruling of the Supreme Judicial Court, in *Rines, Petitioner,* Advance Sheets, 1954, *supra,* at page 33, constituted a disallowance of this "Amended Second Substitute Consolidated Bill of Exceptions", because it

> • • • represented the action which he intended to take as a result of that hearing, and that this action was not an allowance of that bill of exceptions. It was a disallowance • • •

The appellant accordingly filed his Petition to Establish the Truth of Exceptions, No. 11,399. There is no dispute but that he filed it seasonably, within the twenty days provided for by Rule 22 of the Rules for the Regulation of Practice Before the Full Court.

The Supreme Judicial Court, however, summarily dismissed the Petition to Establish the Truth of Exceptions, No. 11,399, the same as it dismissed the Petition to Establish the Truth of Exceptions, No. 11,437, discussed above.

This dismissal, under the practice outlined on page 10 of the Jurisdictional Statement, No. 694, October Term, 1954, was without permitting the appellant to present evidence, or to be heard, before a Commissioner.

The reason assigned by the Supreme Judicial Court for the dismissal of the Petition to Establish the Truth of

Exceptions, No. 11,399, as quoted on page 3 of the Jurisdictional Statement, No. 694, October Term, 1954, is that the "Amended Second Substitute Consolidated Bill of Exceptions" was not "amended in accordance with any order of the judge"; that is, it did not contain those of the changes illegally demanded by the order of the judge of the Superior Court, dated July 2, 1953, that were not in conformity with the truth.

Another of the aims sought to be attained by the Petition for a Writ of Mandamus involved on this appeal, accordingly, was to compel the Superior Court to make a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the said order of July 2, 1953, insofar as the items included in the said order of July 2, 1953, conform to the truth.

The Action Taken by the Single Justice and the Full Court of the Supreme Judicial Court Upon the Petition for a Writ of Mandamus.

The Petition for a Writ of Mandamus came up, in the first instance, before a single justice of the Supreme Judicial Court, who, however, as related on page 19 of the said Jurisdictional Statement, No. 694, October Term, 1954, refused even to issue an order of notice. The reason assigned by the single justice for this refusal was that the appellant's remedy was, not mandamus, but a Petition to Establish the Truth of Exceptions, under the provisions of the before-mentioned second statute, section 117. This, of course, is contrary to the rulings of the Full Court, dismissing the Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,399.

In order to obtain relief from that refusal, the appellant filed his Petition to Establish the Truth of Exceptions, No. 11,458, involved on this appeal.

The Full Court of the Supreme Judicial Court, however, dismissed that Petition to Establish the Truth of Exceptions, No. 11,458, the same as it had previously dismissed the said Petitions to Establish the Truth of Exceptions No. 11,437 and No. 11,399. The order of the Full Court of the Supreme Judicial Court dismissing this Petition to Establish the Truth of Exceptions, No. 11,458, is quoted on page 2, *supra*. Under the practice described on page 7, *supra*, as authorized by the said two statutes, sections 113 and 117, as applied, that order was likewise issued without affording the appellant an opportunity to present evidence or effectively to be heard.

The matter is therefore now before this Court on the present appeal.

The Rulings of the Full Court of the Supreme Judicial Court Upon the Petition to Establish the Truth of Exceptions, No. 11,458, Involved on the Present Appeal.

Paragraph (a) of the Order of the Supreme Judicial Court

Paragraph (a) of the order of the Supreme Judicial Court bears upon Questions Presented 1 and 2.

This Paragraph (a) contains a ruling upon the appellant's prayer that the Superior Court be required to take action upon the "Second Substitute Consolidated Bill of Exceptions". That ruling is:

> (a) This court has already held that *if* the petitioner's Second Substitute Consolidated Bill of Exceptions in his tort actions was ever permitted to be filed, it has been disallowed. *Rines, Petitioner*, Mass. Adv. Sh. (1954) 819, 821 (italics supplied).

Since, under the said two statutes, sections 113 and 117, as applied (see pages 7 and 15, *supra*), the Full Court of the Supreme Judicial Court has never afforded the appellant an opportunity to present evidence, it has been compelled to decide the matter treated in this paragraph (a) of the order upon the speculatively assumed "if" that is italicized in this quotation.

As demonstrated on pages 10-11, *supra*, however, this "if" is contrary to fact; and the Full Court has refused to accord the appellant a hearing, whether before a Commissioner or otherwise, at which the appellant may offer evidence to disprove that "if".

Though, as before stated, therefore, the "Second Substitute Consolidated Bill of Exceptions" was filed in full compliance with the order of January 8, 1951, the Full Court of the Supreme Judicial Court has nevertheless, without hearing the appellant, construed the said two statutes, sections 113 and 117, as authorizing the judge of the Superior Court:

First, to refuse to permit the "Second Substitute Consolidated Bill of Exceptions" to stand as a substitute for or amendment of the original bill of exceptions;

Secondly, to refuse even to hear the appellant as to whether this "Second Substitute Consolidated Bill of Exceptions" should be permitted to stand as a substitute for an amendment of the original bill of exceptions; and

Thirdly, to refuse also either to grant or deny either of the before-described two motions relating thereto: one, a motion to substitute the "Second Substitute Consolidated Bill of Exceptions" for the original bill of exceptions; and the other, a motion to allow the "Second Substitute Consolidated Bill of Exceptions".

Paragraph (b) of the Order of the Supreme Judicial Court

Paragraph (b) of the said order, quoted on page 2, *supra*, bears upon Questions Presented 1 and 3.

This Paragraph (b) contains a holding upon the appellant's prayer that the Superior Court be required to make a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the order of July 2, 1953, insofar as the items included in the said order of July 2, 1953, conform to the truth.

The said paragraph (b) states two propositions:

> It is plain that the so-called [Amended] Second Substitute Consolidated Bill of Exceptions did not comply with the order of July 2, and it does not appear that the petitioner was ever permitted to amend by filing such a bill.

With respect, first, to the second proposition, if it had been true that the judge of the Superior Court did not permit the appellant to amend by filing the "Amended Second Substitute Consolidated Bill of Exceptions", the same issues would have been presented as those discussed above in connection with paragraph (a).

The fact, however, is that the judge of the Superior Court did "at least impliedly" (*Krinsky* v. *Stevens Coal Sales Company, Inc.*, 309 Mass. 528, 532) permit the appellant to amend by filing the "Amended Second Substitute Consolidated Bill of Exceptions"; for, without such permission, of course, the "Amended Second Substitute Consolidated Bill of Exceptions" could not have been before him, and he could not, therefore, have denied the motion to allow it. That denial, furthermore, as explained on page 13, *supra*, constituted a disallowance of the "Amended Second Substitute Consolidated Bill of Exceptions".

A more important matter, however, is contained in the first proposition, of the said Paragraph (b), namely, "that the so called [Amended] Second Substitute Consolidated Bill of Exceptions did not comply with the order of July 2". By that first proposition, the Supreme Judicial Court has so applied the said two statutes, sections 113 and 117, as:

First, to authorize the judge of the Superior Court illegally to issue an order requiring the appellant to amend a bill of exceptions into non-conformity with the truth, under penalty of driving the appellant out of court altogether, for refusal to do so; and,

Secondly, to deny the appellant a hearing, both in the Superior Court and the Supreme Judicial Court, at which to offer evidence that, in order to comply with this illegal order of the judge of the Superior Court, it would be necessary to violate the truth.

Paragraph (c) of the Order of the Supreme Judicial Court

Paragraph (c) of the order, quoted on page 2, *supra*, bears upon Questions Presented 1 and 4.

This Paragraph (c) constitutes a holding by the Supreme Judicial Court to the effect that, under the said two statutes, sections 113 and 117, as applied, the appellant is entitled to no remedy, at all, until the Superior Court first performs the acts sought to be performed by the Petition for the Writ of Mandamus; and, notwithstanding that fact, that the Superior Court nevertheless cannot be compelled to perform those acts, or even to grant the appellant a hearing as to that matter.

Paragraph (d) of the Order of the Supreme Judicial Court

Paragraph (d) of the order of the Supreme Judicial Court has no bearing upon the Questions Presented.

The Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,458, Was in Violation of the Fourteenth Amendment to the Constitution of the United States.

The appellant has not, either in the Superior Court or the Supreme Judicial Court, obtained the "basic requirement of due process", namely the fair hearing, referred to by this Court in the *Matters of Lee Roy Murchison and John White*, Petitioners, No. 405, October Term, 1954, May 16, 1955.

As applied by the Supreme Judicial Court, therefore, the said two statutes, sections 113 and 117, as demonstrated on pages 20-22 of the Jurisdictional Statement, No. 694, October Term, 1954, have deprived the appellant, both in the Superior Court and the Supreme Judicial Court, contrary to due process, of a hearing, at which to present evidence; he has been denied the equal protection of the laws; and his privileges and immunities, as a citizen of the United States, have been abridged.

As stated in the dissenting opinion, *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37, where a state does

> provide a system of appellate court review * * * proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that "due process" which the Fourteenth Amendment requires. *Cole* v. *Arkansas*, 333 U. S. 196, 201-202, and cases there cited.

The majority opinion did not disagree with this statement in the dissenting opinion. The only point of disagreement was that

> The dismissal here is not regarded by us as a penalty imposed as a punishment for criminal contempt.

In the present case, on the other hand, the dismissal by the Supreme Judicial Court *was* as a punishment for the refusal of the appellant to obey an illegal order of the judge of the Superior Court.

As the majority opinion reads further, though the right to "review is not a requirement of due process", nevertheless,

> • • • a statutory review is important and must be exercised without discrimination • • •

There is also another point of difference. The majority opinion reads also:

> Furthermore, the appeal was not summarily dismissed. Petitioner was allowed 15 days, after being adjudged in contempt, within which to purge itself.

In the present instance, on the other hand, as appears from pages 12-13, *supra*,

> I did not, therefore, defy the said judge of the Superior Court. I merely requested that the said judge of the Superior Court reconsider its order with respect to those few items that do not conform to the truth, and I also requested a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the said order of July 2, 1953, insofar as the items contained in the said order conform to the truth. These requests, however, have been ignored.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

Attention is invited to the discussion of this topic on ages 27 to 30 of the Jurisdictional Statement, No. 694, ctober Term, 1954.

A decision upon this appeal will affect every litigant who ay be unlucky enough to have forced upon him, against is will, and without his own choice, a hostile, partial, iased and prejudiced judge of the Superior Court.

It is therefore respectfully submitted that the Supreme ourt of the United States has jurisdiction of this appeal, nd that substantial federal questions are presented.

Respectfully submitted,

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